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# Reassessing the Beloved Double Irish Structure in Light of GILTI

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In this article, the authors discuss the new global intangible low-taxed income provisions of the Tax Cuts and Jobs Act and reassess the double Irish structure and whether it continues to deliver tax savings.



Not only did the Tax Cuts and Jobs Act of 2017 (P.L. 115-97) retain subpart F in its entirety, it added a new anti-deferral rule — global intangible low-taxed income (GILTI) — in new section 951A. In light of GILTI, U.S. multinationals are reassessing their international deferral structures.

In this article, we review the new GILTI provisions and reassess the double Irish structure using a case study that compares it with a single Irish structure. We conclude that the double Irish continues to deliver tax savings, albeit not quite as well as before GILTI.

## The GILTI Provisions

New section 951A generally provides that a U.S. shareholder[1] of any controlled foreign corporation must include in gross income its GILTI for each tax year.

GILTI is any excess of that U.S. shareholder's net CFC tested income, over that shareholder's net deemed tangible income return. The term "net CFC tested income" means any excess of the aggregate of the shareholder's pro rata share of the tested income of each CFC, over the aggregate of that shareholder's pro rata share of the tested loss of each CFC for which that shareholder is a U.S. shareholder for the tax year. The term "net deemed tangible income" means the excess of 10 percent of the aggregate of the shareholder's pro rata share of the qualified business asset investment of each CFC, over the amount of interest expense used in determining the shareholder's net CFC tested income to the extent the interest income attributable to that expense is not used in determining the shareholder's net CFC tested income.

The term "qualified business asset investment" means a CFC's average aggregate adjusted bases (as of the close of each quarter of the tax year) in specified tangible property.[2] "Specified tangible property" means property used in the CFC's trade or business that is of a type for which a deduction is allowable under section 167.

The term "tested income" means any excess of the gross income of a CFC determined without regard to:

- U.S.-source gross income that is effectively connected with the conduct by such corporation with a trade or business within

[1]Before the TCJA, section 951(b) provided that the term "U.S. shareholder" meant, for any foreign corporation, a U.S. person as defined in section 957(c) that owned (under section 958(a) and (b)) at least 10 percent of the total combined voting power of all classes of that corporation's stock entitled to vote. TCJA section 14214 amended the definition of U.S. shareholder by inserting at the end of section 951(b) "or 10 percent or more of the total value of shares of all classes of stock of such foreign corporation." As amended, a U.S. shareholder is a U.S. person that owns at least 10 percent of the vote or value of any foreign corporation. The amendment is effective for tax years beginning after December 31, 2017.

[2]For section 951A(d), the adjusted basis in any property is determined by (i) using the alternative depreciation system under section 168(g) and (ii) allocating the depreciation deduction ratably to each day of the period. Special rules apply to property owned by a partnership owned by a CFC. Finally, section 951A(d)(4) directs Treasury to issue regulations or other guidance to prevent the avoidance of section 951A(d), including regulations or other guidance that provides for the treatment of property transferred or held temporarily.

the United States and that is not exempt from U.S. tax;
- any gross income used in determining the subpart F income of that corporation;
- any gross income excluded from the foreign base company income (as defined in section 954) and the insurance income (as defined in section 953) of the corporation under section 954(b)(4);[3]
- any dividend received from a related person (as defined in section 954(d)(3)); and
- any foreign oil and gas extraction income (as defined in section 907(c)(1)) of the corporation,

over the deductions (including taxes) properly allocable to that gross income under rules similar to section 954(b)(5) (or to which those deductions would be allocable if there were that kind of gross income).

The term "tested loss" means any excess of such deductions (including taxes), over such gross income.

In general, any GILTI that is in gross income is treated the same as an amount included in gross income under section 951(a)(1)(A) — that is, like an item of subpart F income.

Finally, the TCJA also amended section 960 (regarding deemed paid foreign tax credits for subpart F inclusions) by adding new subsection (d). The new section provides that a U.S. shareholder that is a domestic corporation is deemed to have paid foreign taxes equal to 80 percent of the corporation's inclusion percentage[4] multiplied by the aggregate tested foreign income taxes[5] paid or accrued by CFCs.

The TCJA amended section 904(d) to create a new FTC limitation basket for non-passive GILTI (with no carryforward or carryback of excessive FTCs), and amended section 78 to provide that the gross-up equals 100 percent of the deemed paid foreign taxes (except for sections 245 and 245A).

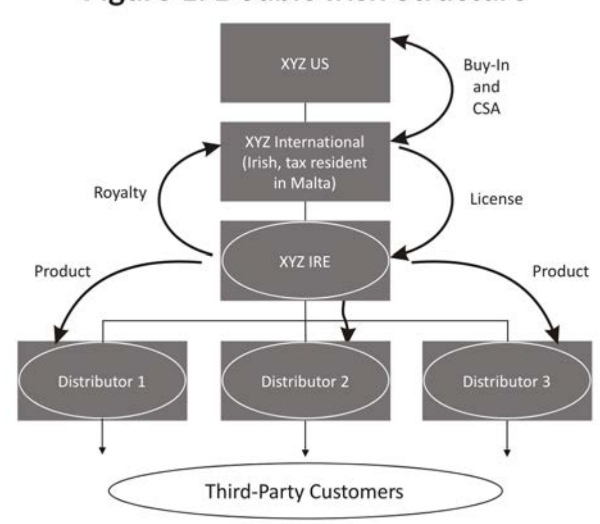
## Case Study

XYZ Technology Corp. (XYZ US), a U.S. publicly traded company, produces software and distributes it globally. Several years ago, XYZ US formed XYZ International, a nonresident Irish company that is tax resident in Malta. XYZ US transferred the non-U.S. rights to its IP to XYZ International through a license agreement (the buy-in). Coterminous with the buy-in, XYZ US and XYZ International entered into a cost-sharing agreement to jointly fund the continuing and future development of the XYZ IP. (See Figure 1.)

**Table 1. Inputs and Assumptions**

| | |
|---|---|
| 1. U.S. Tax Rate | 21.0% |
| 2. Irish Tax Rate | 12.5% |
| 3. Maltese Tax Rate | 0.0% |
| 4. Allowed Return on QBAI Investment | 10.0% |
| 5. Deemed Paid Credit Proportion | 80.0% |
| 6. Deduction for GILTI Amount Through 2025 | 50.0% |

**Figure 1. Double Irish Structure**




[3] Section 954(b)(4) excludes from foreign base company income and insurance income any item of income of a CFC that was subject to an effective rate of foreign income tax greater than 90 percent of the maximum rate of tax specified in section 11 (commonly referred to as the high-tax kick-out). Before the TCJA, the highest rate of corporate income tax under section 11 was 35 percent; after, the highest rate under section 11 is 21 percent.

[4] A domestic corporation's inclusion percentage is equal to its GILTI divided by its pro rata shares of the tested income of its CFCs.

[5] The term "tested foreign income taxes" means the foreign income taxes paid or accrued by a CFC that are properly attributable to the tested income of that foreign corporation taken into account by the domestic corporation under section 951A.

Thereafter, XYZ International formed XYZ Ireland, a resident Irish company that was checked to be treated as a disregarded entity for U.S. federal tax purposes. XYZ International licensed its IP (the non-U.S. rights to the XYZ IP) to XYZ Ireland, which sells its IP and software through various wholly owned cost-plus marketing subsidiaries located throughout Europe and the Pacific Rim (the distributors). The distributors were all checked to be treated as disregarded entities for U.S. federal tax purposes.

Table 2 provides the P&L statement for the double Irish structure. For the sake of simplicity, it is assumed that all profits from distribution are earned in Ireland. Table 3 then calculates the GILTI, taxes attributable to the GILTI, and deemed paid credit available under this structure. Table 4 calculates the worldwide income tax and effective tax rate under the double Irish structure.

**Table 2. P&L Statement**
**(Amounts in US $ (thousands))**

| | U.S. | International | Ireland* |
|---|---|---|---|
| **Revenue** | | | |
| Sales | - | - | 23,000 |
| Royalty | 400 | 3,300 | - |
| CSA Payment | 200 | - | - |
| **Total Revenue** | 600 | 3,300 | 23,000 |
| **Total COGS** | - | - | 2,700 |
| **OPEX** | | | |
| Bad Debt | - | - | 200 |
| G&A | - | - | 3,000 |
| CSA Payment | - | 200 | - |
| Marketing | - | - | 2,200 |
| Sales | - | - | 7,500 |
| OPEX - D&A | - | - | 2,500 |
| Royalty | - | 400 | 3,300 |
| **Total OPEX** | - | 600 | 18,700 |
| **Other Expenses** | | | |
| Interest & Other Expense | - | - | 20 |
| Sales Tax | - | - | 700 |
| **Other Expenses** | - | - | 720 |

**Table 2. P&L Statement**
**(Amounts in US $ (thousands))** *(Continued)*

| | U.S. | International | Ireland* |
|---|---|---|---|
| **Profit** | 600 | 2,700 | 880 |
| **Income Taxes** | 126 | - | 110 |

*For simplicity, it is assumed that all profits from distribution are earned in Ireland.

**Table 3. GILTI Calculation**
**(Amounts in US $ (thousands))**

| | | |
|---|---|---|
| Foreign Operating Profits | | 3,580 |
| Foreign Income Taxes | | 110 |
| Net CFC Tested Income (Loss) | | 3,470 |
| PP&E | | 2,300 |
| Depreciation | | <450> |
| Qualified Business Asset Investment (QBAI) | | 1,850 |
| Interest Expense | | 20 |
| Net Deemed Tangible Income Return | 10.0% | 165 |
| Global Intangible Low-Taxed Income (GILTI) | | 3,305 |
| Inclusion Percentage | | 95.24% |
| Taxes Attributable to GILTI | | 105 |
| Deemed Paid Credit Available (FTC) | 80.0% | 84 |

**Figure 2. Single Irish Structure**

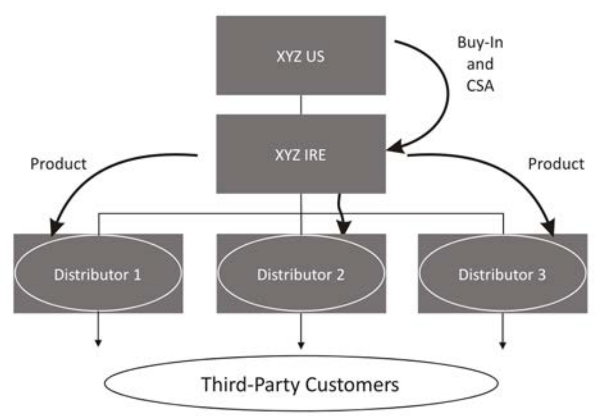


**Table 4. Post-TCJA Tax Liability (Amounts in US $ (thousands))**

| | U.S. | International | Ireland |
|---|---|---|---|
| Total Revenue | 600 | 3,300 | 23,000 |
| Total Expenses | - | <600> | <22,120> |
| Net Profit | 600 | 2,700 | 880 |
| Local Income Tax Rate | 21% | 0% | 12.5% |
| Income Taxes Due Pre-GILTI | 126 | - | **110** |
| GILTI Inclusion | 3,305 | | |
| Section 78 Gross-Up | 105 | | |
| Section 250 Deduction | <1,705> | | |
| Adjusted Income | 1,705 | | |
| U.S. Tax on GILTI (21%) | 358 | | |
| FTC Against GILTI | 84 | | |
| Total U.S. Tax After FTC* | **400** | | |
| Maltese Income Tax | - | | |
| Irish Income Tax | **110** | | |
| Worldwide Income Tax | **510** | | |
| Effective Tax Rate** | **12.21%** | | |

*400 (Total U.S. Tax After FTC) = 126 (U.S. Income Taxes Due Pre-GILTI) + 358 (U.S. Tax on GILTI) - 84 (FTC Against GILTI)

**ETR = 510/4,180

The single Irish structure is basically the same as the double Irish structure, except that XYZ International has been eliminated. The buy-in and CSA are now between XYZ US and XYZ Ireland. (See Figure 2.)

Table 5 provides the P&L statement for the single Irish structure. For the sake of simplicity, it is assumed that all profits are earned in Ireland. Table 6 then calculates the GILTI, taxes attributable to the GILTI, and deemed paid credit under this structure. Table 7 calculates the worldwide income tax and effective tax rate under the single Irish structure.

**Table 5. P&L Statement (Amounts in US $ (thousands))**

| | U.S. | Ireland* |
|---|---|---|
| **Revenue** | | |
| Sales | - | 23,000 |
| Royalty | 400 | - |
| CSA Payment | 200 | - |
| **Total Revenue** | 600 | 23,000 |
| **Total COGS** | - | 2,700 |
| **OPEX** | | |
| Bad Debt | - | 200 |
| G&A | - | 3,000 |
| CSA Payment | - | 200 |
| Marketing | - | 2,200 |
| Sales | - | 7,500 |
| OPEX - D&A | - | 2,500 |
| Royalty | - | 400 |
| **Total OPEX** | - | 16,000 |
| **Other Expenses** | | |
| Interest & Other Expense | - | 20 |
| Sales Tax | - | 700 |
| **Other Expenses** | - | 720 |
| **Profit** | 600 | 3,580 |
| **Income Taxes** | 126 | 448 |

*For the sake of simplicity, it is assumed that all profits from distribution are earned in Ireland.

**Table 6. GILTI Calculation (Amounts in US $ (thousands))**

| | | |
|---|---|---|
| Foreign Operating Profits | | 3,580 |
| Foreign Income Taxes | | 448 |
| Net CFC Tested Income (Loss) | | 3,133 |
| PP&E | | 2,300 |
| Depreciation | | <450> |
| Qualified Business Asset Investment (QBAI) | | 1,850 |
| Interest Expense | | 20 |
| Net Deemed Tangible Income Return | 10.0% | 165 |
| Global Intangible Low-Taxed Income (GILTI) | | <u>2,968</u> |
| Inclusion Percentage | | 94.7% |
| Taxes Attributable to GILTI | | 424 |
| Deemed Paid Credit Available (FTC) | 80.0% | 339 |

**Table 7. Post-TCJA Tax Liability (Amounts in US $ (thousands))**

| | U.S. | Ireland |
|---|---|---|
| Total Revenue | 600 | 23,000 |
| Total Expenses | - | 19,420 |
| Net Profit | 600 | 3,580 |
| Local Tax Rate | 21% | 12.5% |
| Income Taxes Due Pre-GILTI | 126 | **448** |
| GILTI Inclusion | 2,968 | |
| Section 78 Gross-Up | 424 | |
| Section 250 Deduction | <1,696> | |
| Adjusted Income | 1,696 | |
| U.S. Tax on GILTI (21%) | 356 | |
| FTC Against GILTI | 339 | |
| Total U.S. Tax After FTC* | **143** | |
| Irish Income Tax | **448** | |
| Worldwide Income Tax | **590** | |
| Effective Tax Rate** | **14.13%** | |

*143 (Total U.S. Tax After FTC) = 126 (U.S. Income Taxes Due Pre-GILTI) + 356 (U.S. Tax on GILTI) - 339 (FTC Against GILTI)

**ETR = (590/4,180)

**Table 8. Comparison – Double vs. Single Irish**

| | Double Irish Structure | Single Irish Structure | Difference |
|---|---|---|---|
| Worldwide Tax | 510 | 590 | <u>**80**</u> |
| Worldwide Operating Profit | 4,180 | 4,180 | - |
| Worldwide ETR | 12.21% | 14.13% | <u>**1.92%**</u> |

Table 8 compares the worldwide tax and effective tax rates under the double Irish and single Irish structures. On these facts, the double Irish continues to deliver tax savings over a single Irish structure. ■